United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1144

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To be argued by
BOB A. KRAMER

In The

UNITED STATES COURT OF APPEALS
For the Second Circuit

Docket No.
76-1144

UNITED STATES OF AMERICA,

Appellee,

-against-

DAVID S. COURTNEY,

Defendant-Appellant.

APPELLANT'S BRIEF ON APPEAL

CANTOR & KRAMER, ESQS.
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Appellant
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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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UNITED STATES OF AMERICA,

-against-

DAVID S. COURTNEY,

Defendant-Appellant.

Docket No.
76 - 1144

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APPELLANT'S BRIEF ON APPEAL

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PRELIMINARY STATEMENT

The indictment number is 75 CR 1075. The names of the parties are - The United States of America -v- David S. Courtney.

The action was commenced by an indictment charging the defendant-appellant with unlawfully, wilfully and knowingly, stealing, purloining and converting to his own use a typewriter whose value was in excess of $100.00, and which was owned by the United States Veterans Administration.

This is an appeal from a verdict of the District Court for the Southern District of New York, entered January 26, 1976, convicting the defendant-appellant, after trial by jury, of unlawfully, wilfully and knowingly stealing, purloining and converting to his own use a typewriter whose value was less than $100.00, a misdemeanor.

The defendant-appellant was sentenced before the Hon. Inzer B. Wyatt, on March 5, 1976 to a term of six months. The defendant-appellant was continued on his own personal recognizance bond pending his appeal to this Court and is currently at liberty on said bond.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

- -x

UNITED STATES OF AMERICA,

Appellee,

-against-

DAVID S. COURTNEY,

Defendant-Appellent.

- -x

FACTS

Government's Case

The Government called as its first witness Conception Tirado, a dietitian at the Bronx Veterans Administration Hospital. She testified that on June 24, 1975, she was working in her office which is located on the second floor of one of the Hospital buildings designated as D Building (p. 39) *. Somewhere between two and three o'clock in the afternoon of that day Ms. Tirado and a co-worker Ms. Dudeck, also a dietitian employed by the Veterans Administration Hospital, left her office to visit a patient.

After leaving her office, Ms. Tirado testified that she observed the defendant exiting from an office holding an object in

* Numbers in parenthesis refer to pages of Trial Transcript

his hands. The defendant turned to his right and proceeded in the same direction as Ms. Tirado was proceeding and at this time Ms. Tirado stated that she noticed the defendant was carrying a typewriter wrapped in a garbage bag (p. 40). She went on to describe the individual and then testified that she had seen this man in the hospital on at least 50 other occasions in the hospital canteen (p. 41). Ms. Tirado then observed the defendant enter a side door which led to a staircase leading to the outside of the building (p. 43).

At this point Ms. Tirado told a secretary what she had just witnessed and the secretary called the security department (p. 59).

Approximately one-half hour later Ms. Tirado again saw the defendant in the company of security guards walking towards an elevator on the ground floor of D Building. At this time, a Mr. Huntley, the chief of security approached Ms. Tirado and asked whether this was the man and she answered "yes" (p. 44).

The next witness to testify in behalf of the Government was Ms. Barbara Dudeck. Her testimony was similar to that of Ms. Tirado in that she was walking with Ms. Tirado when she observed the defendant exit from an office carrying a typewriter in his hands. She further testified that she personally called security

and notified them of what she had just observed (p. 65).

The third witness to testify was James H. Gilliam, a security guard employed at the Bronx Veterans Administration Hospital. One June 24, 1975, he was assigned to patrol the Webb Avenue gate of the hospital. Mr. Gilliam testified that at approximately four o'clock in the afternoon he observed something covered up with plastic between an air conditioning unit on the outside of Building 7 and the building itself. An inspection of the object revealed a typewriter (p. 81).

The next witness to testify in behalf of the Government was Leonard Levine who was employed by the Bronx Veterans Administration Hospital in the supply division. Mr. Levine testified that by obtaining a serial number from the typewriter in question and checking this number against his records concerning the purchasing of equipment for the hospital, he was able to ascertain that the typewriter in question was purchased by the hospital for $141.00 and that the unit itself was charged to the medical services department of the hospital (p. 86).

The last witness to be called by the Government was Owen Huntley who was employed as the chief of the security department of the hospital. Mr. Huntley testified that he had received a call on June 24, 1975, through his walky-talky system that there had been a

theft of a typewriter from D Building. As a result of this communication he met Ms. Tirado and Ms. Dudeck and had a further conversation with them. As a result of the conversation Mr. Huntley proceeded to the hospital canteen where he saw the defendant seated at a table. The defendant was requested to accompany Mr. Huntley to his office but the defendant refused. At this time the defendant was placed under arrest (pp. 94-97).

The defendant was subsequently taken to the security office by Mr. Huntley and other guards. Shortly thereafter the typewriter in question was brought into the security office. At this time, and over the objection of defense counsel, pictures of the typewriter, and not the typewriter itself, were introduced into evidence by the government. Mr. Huntley then ordered that pictures be taken of the typewriter and the plastic bag (pp.98-100).

Defendant's Case

The defendant rested after the Government's case without calling any witnesses.

POINT I

THE VERDICT OF GUILTY SHOULD BE SET ASIDE AS BEING AGAINST THE WEIGHT OF EVIDENCE IN THAT THE GOVERNMENT FAILED TO PROVE THE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT

The burden is on the Government to establish beyond a reasonable doubt every element necessary to constitute the crime. Davis v. United States, 1895, 160 U.S. 469, 487, 16 S. Ct. 353, 358, 40 L. Ed. 499; In re Winship, 1970, 397 U. S. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368.

In the instant matter the evidence introduced by the Government established that the defendant was seen carrying a typewriter out of one of the offices located in one of the hospital buildings. A typewriter is then found on the grounds of the hospital between an air conditioning unit and the exterior wall of a building other than the one in which the defendant was first seen carrying a typewriter covered by a plastic bag. At the time of the defendant's arrest he was sitting in the hospital canteen and was not in possession of any typewriter.

In Rainwater v. United States, C. A. Tex. 1971, 443 F. 2d 339, cert. denied 92 S. Ct. 295, 404 U. S. 943, 30 L. Ed. 2d 258, the court held that any appreciable change of location of property

with felonious intent, whether there is actual removal of it from the owner's premises or not, constitutes "asportation" sufficient to consummate the federal offense of theft. It is important to note that while an item of personal property does not have to be removed from the owner's premises, these must be an appreciable change of location with felonious intent. Furthermore, there must be a showing that the felonious intent involved the intent of converting the property to one's own use.

In United States v. Barlow, 1972, 470 F. 2d 1245, 152 U. S. App. D. C. 336, the court held that "larceny" required the wrongful taking and carrying away, asportation, of personal property of another with fraudulent intent to deprive the owner of his property without his consent.

It is respectfully submitted that the Government failed to sustain its burden of proving that the defendant acted with felonious intent in allegedly removing the typewriter from one place to another. There was absolutely no showing that the defendant intended to convert the typewriter to his own use. The Government's contention is that the facts adduced at trial lead to the presumption that the defendant acted with criminal intent. It is, however, submitted that the acts depicted by the Government's witnesses can just as easily be interpreted as the acts of an individual engaging in disruptive behavior without any criminal intent. In any case when the acts alleged are as much indictative of innocence as guilt, the presumption of innocence must prevail.

POINT II

THE TRIAL COURT'S RULING THAT IF THE DEFENDANT WERE TO TESTIFY IT WOULD ALLOW THE GOVERNMENT TO CROSS-EXAMINE AS TO ANY AND ALL FELONY CONVICTIONS CONSTITUTED REVERSIBLE ERROR

Rule 609 provides in part as follows:

> (a) General rule. - For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, AND THE COURT DETERMINES THAT THE PROBATIVE VALUE OF ADMITTING THIS EVIDENCE OUTWEIGHS ITS PREDJUDICIAL EFFECT TO THE DEFENDANT, or (2) involved dishonesty or false statement, regardless of the punishment. (emphasis supplied)

Prior to trial defense counsel made an application to the trial court to preclude the Government from cross-examining the defendant concerning any acts of immorality or illegality on the ground that "it would impose an undue chill on the right of my client to testify and take the stand." (See pages 18 through 22 of transcript of January 13, 1976.) After a general discussion on this point the trial judge ruled that he would permit the Government to cross-examine on any felony convictions and laid the issue at rest.

Rule 609(a) find its genesis in Luck v. United States, 348 F. 2d 763 (D. C. Cir. 1965). The Luck case pioneered a balancing approach which gives the trial judge latitude to deny or limit the use of convictions for impeachment purposes if he finds that the truth-seeking process would be enhanced. The judge must assess pertinent, individual factors to determine whether the cause of truth would be helped by hearing defendant's story and whether the prejudicial effect of the prior convictions would outweigh their probative value.

The application of the Luck doctrine has been clarified in a long line of subsequent decisions, particularly in the case of Gordon v. United States, 383 F. 2d 936 (D. C. Cir. 1967), cert. denied, 390 U. S. 1029, 88 S. Ct. 1421, 20 L. Ed. 2d 287 (1968). In the Gordon case, then Judge Berger set forth certain factors to be considered by the trial judge: (1) the nature of the crime; (2) the time of conviction and the witness' subsequent history; (3) similarity between the past crime and the charged crime; (4) importance of defendant's testimony; and (5) the centrality of the credibility issue.

In United States v. Palumbo, 401 F. 2d 270, 273 (2d Cir. 1968), cert. denied, 394 U. S. 947, 89 S. Ct. 1281, 22 L. Ed. 2d 480 (1969), this Court held

> ". . . . that a trial judge may prevent such use, (prior convictions), if he finds that a prior conviction negates credibility only slightly but creates a substantial chance of unfair prejudice, taking into account such factors as the nature of the conviction, its bearing on veracity, its age, and it propensity to influence the minds of the jurors improperly."

See also United States v. Puco, 453 F. 2d 536, 542-543 (2d Cir. 1971); United States v. De Angelis, 490 F. 2d 1004, 1009 (2d Cir.), cert. denied, 416 U. S. 956, 94 S. Ct. 1970, 40 L. Ed. 2f 306 (1974).

Taking Rule 609 and the above mentioned cases in conjunction with Rule 104(c), a hearing would have to be held concerning the admissibility of prior convictions because only a hearing enables the trial judge to develop the pertinent facts sufficiently so that he can meaningfully exercise his discretion, and only a hearing outside the presence of the jury protects the defendant.

In the case at bar the trial judge ruled that the Government could cross-examine the defendant as to any and all prior felony convictions. No attempt was made to determine what the felony convictions were or when the convictions took place. The trial judge should have conducted a hearing to determine what if any prior convictions could be used to impeach the defendant if he were to testify. The failure to conduct such a hearing constituted reversible error.

POINT III

THE FAILURE OF THE GOVERNMENT TO INTRODUCE INTO EVIDENCE THE TYPEWRITER IN QUESTION, COUPLED WITH THE INTRODUCTION INTO EVIDENCE OF BLACK AND WHITE PICTURES OF THE TYPEWRITER, CONSTITUTED REVERSIBLE ERROR.

The defendant was charged with stealing a typewriter from a Veterans' Administration Hospital. At no time during the trial was the typewriter introduced into evidence. Ms. Tirado testified that she saw the defendant carrying a typewriter which was half covered by a plastic bag light, neutral beige in color. (p. 48) Ms. Dudeck testified that the bag was "filmy plastic, like a pink or orange color, very light color, like a see-through." (p. 64) Both witnesses testified that the typewriter was half-covered by the plastic bag and that one knew that it was an IBM because she could make out the letters "BM" on the typewriter.

Various pictures were introduced into evidence, all over the objection of defense counsel, showing the typewriter half-covered by a plastic bag (p. 99), the bottom of the typewriter (p. 101), and the top of a desk where the typewriter was allegedly taken from (p. 101). All pictures were black and white. Mr. Huntley stated that he had no idea where the typewriter in question was at the time of trial (p. 104). /It was subsequently learned from the United States Attorney's Office that the typewriter in question was still being used by the Veterans Hospital./

The introduct[illegible] into evidence of these pictures greatly prejudiced the defendant in that the picture depicted the typewriter half-covered by the plastic bag exactly as described by the witnesses who saw the defendant allegedly carrying a typewriter. Because of the lack of any direct evidence to show the criminal intent of the defendant as well as the inconsistent testimony of the color of the plastic bag, the introduction of black and white photographs of the typewriter half-covered with a plastic bag instilled in the minds of the jurors that this is exactly what the two witnesses must have seen. It must be pointed out at this juncture that both witnessess who saw the defendant carrying a typewriter were never shown the pictures during the trial. Mr. Huntly testified that he had pictures of the typewriter and desk taken by the illustration department of the hospital.(p. 100) There is no doubt that Mr. Huntley set up the typewriter to look exactly like the description given by Ms. Tirado and Ms. Dudeck.

It is conceded by the defendant that the best evidence rule generally only applies to the contents of a writing and that the rule does not require that chattels be introduced into evidence. Illustrating this point is the case of Hill v. State, 142 S. E. 2d 909, 221 GA. 65 (1965) where in a trial for robbery photographs of the art objects taken by the defendant rather than the art works themselves were introduced into evidence. The case at bar differs from the Hill case in that the typewriter was pictured in a set-up manner to look exactly

like how the defendant was supposedly carrying it. A proper foundation was not laid for the introduction into evidence of these pictures in that Ms. Tirado and Ms. Dudeck were never asked whether the picture of the typewriter half-covered by a plastic bag fairly and accurately represented how the typewriter looked when the defendant was allegedly seen carrying it.

In the absence of redeeming probative value, exclusion of evidence because of the capacity for prejudice has long been the practice. In International Shoe Mach. Corp. v. United Shoe Mach. Corp., 315 F. 2d 449, 459 (1st Cir.), cert. denied, 375 U.S. 820, 84 S. Ct. 56, 11 L. Ed 2d 54 (1963) it was held that the courts traditionally must weigh the probative value of the evidence sought to be admitted against the capacity for prejudice which the evidence might engender. Where the prejudice quotient is high, the fact will frequently render inadmissible evidence which - from a purely logical standpoint - may have a significant probative thrust.

Accordingly, the introduction into evidence of a black and white picture of a typewriter half-covered by a plastic bag was error in that a proper foundation was not made and further, because of the prejudicial effect it had on the minds of the jurors.

POINT IV

THE ASSISTANT UNITED STATES ATTORNEY'S COMMENTS ON SUMMATION CONCERNING DEFENDANT'S FAILURE TO CALL WITNESSES OR TESTIFY ON HIS OWN BEHALF CONSTITUTED REVERSIBLE ERROR

During his summation the prosecutor, commenting on other possible explanations to the evidence adduced at trial, stated "What are they? Has he (meaning the defendant) given one explanation for why a typewriter is found between an air conditioning unit and a building near a parking lot?"

In a federal trial, a judge's or prosecutor's comment on defendant's failure to testify is reversible error. 18 U.S.C.A. § 3481, Griffin v. State of California, 380 U. S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106, rehearing denied 381 U. S. 957, 85 S. Ct. 1797, 14 L. Ed. 2d 730.

While it is conceded that this comment in and of itself would not be sufficient to constitute reversible error, it is submitted that this statement, when added to all the other errors committed during trial, and when taking into account the lack of direct evidence against the defendant, could not help but to prejudice the jurors' minds.

The comment on defendant's silence in effect impermissibly forces the defendant to testify against himself. See. United States v. Tillman, 470 F. 2d 142, cert. denied. McCants v. United States, 410 U. S. 968, 93 S. Ct. 1451, 35 L. Ed. 2d 702.

POINT V

THE VERDICT OF GUILTY MUST BE SET ASIDE AS BEING AGAINST THE WEIGHT OF EVIDENCE

The defendant was charged with stealing property valued in excess of $100.00. The jury convicted the defendant of stealing property valued at less than $100.00 The only evidence brought forth at trial concerning the value of the typewriter was the testimony of Mr. Levine who testified that the typewriter in question was purchased by the hospital for $441.00 (p. 86). There was no other evidence concerning its present day market value. The word "value" is defined in 18 U.S.C.A. § 641 as follows: "The word 'value' means face, par, or market value, or cost price, either wholesale or retail, whichever is greater." Accordingly, by law the defendant should not have been found guilty of stealing property valued at less than $100.00 because there was no evidence to substantiate the conviction.

The verdict in the case at bar cannot be considered an inconsistent verdict which is not basis for setting it aside. United States v. Dunn (1932), 284 U.S. 390, 52 S. Ct. 189, 76 L. Ed. 356; Stickler v. United States, 7 F. 2d 59 (CCA 2d 1925). The instant verdict can only be considered a compromise verdict and must be set aside.

In reply to a note from the jurors concerning the value of the typewriter, the judge instructed the jury as follows:

> The Court: As I explained, the reason for that has nothing to do with the guilt of the offense or not, but it has to do with the punishment provided in the law for the offense.
>
> There's one punishment if the value of the property does not exceed the sum of one hundred dollars, and there's another punishment if the value of the property does exceed the sum of one hundred dollars (p. 144).

Almost immediately after retiring again to deliberate the jury returned and found the defendant guilty of stealing property valued at less than $100.00, a verdict totally inconsistent with the evidence.

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED IN ALL RESPECTS AND THE CHARGE DISMISSED

Respectfully submitted,

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